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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

<<>>

:: JUDGMENT ::

Sukha Ram Vs. Sirvi Choyal Samaj, Dhanla

S.B. CIVIL SECOND APPEAL NO.261/2007.

Against the judgment and decree dated 24.04.2007 passed by the District Judge, Pali in Civil Appeal (Decree) No.40/2006 affirming the judgment and decree dated 10.07.2006 passed by the Civil Judge (Junior Divison), Marwar Junction in Civil Original Suit No.51/1997.

Date of Judgment :: 27th July 2007.

PRESENT

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. Jai Kishan Bhaiya, for the appellant.
Mr. K.C. Samdariya, for the respondent.

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BY THE COURT:

This second appeal has been preferred against the judgment and decree dated 24.04.2007 passed by the District Judge, Pali in Civil Appeal (Decree) No.40/2006 dismissing the appeal preferred by the defendant-appellant against the judgment and decree dated 10.07.2006 passed by the Civil Judge (Junior Division), Marwar Junction in Civil Suit

No.51/1997 whereby the suit filed by the plaintiff-respondent for recovery of possession and mesne profits was decreed.

Briefly put, the relevant background facts are that the suit aforesaid was filed by the plaintiff – Sirvi Choyal Samaj, Dhanla through its representative Prema Ram – with the submissions that the house belonging to the Samaj as described in paragraph-2 of the plaint was situated at village Dhanla, District Pali; that half portion of the said house was purchased by the plaintiff from the defendant on 07.02.1989 for a consideration of Rs.30,000/-; that the defendant executed a sale-deed that was registered on 18.02.1989 and handed over physical possession of the property to the plaintiff; and that the remaining half eastern side portion of the house was sold by the defendant to the plaintiff on 17.02.1989 for a consideration of Rs.30,000/-, its physical possession was handed over to the plaintiff, and the sale-deed was got registered on 08.03.1989. According to the plaintiff, the said house was taken on rent by the defendant from the plaintiff on 20.06.1991 for 11 months on a monthly rent of Rs.50/-; that the rent was payable by 20th day of every month under receipt; and it was agreed that the defendant shall not induct any sub-tenant and shall hand over the premises to the plaintiff on 20.05.1992 . The plaintiff alleged that the defendant executed and delivered a rent note on 20.06.1991 and thus,

entered into the possession of suit premises as a tenant. It was alleged that on 01.01.1992 the defendant made payment of rent due upto 19.12.1991 and the remaining amount of rent was not paid despite demands; that the defendant was a habitual defaulter; and that the suit premises were required by the plaintiff for their community purposes. According to the plaintiff, it was a fixed term tenancy that expired on 20.05.1992 and, therefore, there was no need of serving any notice terminating tenancy but, without prejudice to its rights and for the convenience of the defendant, the plaintiff sent a notice on 30.08.1997 by registered post and requested the defendant to hand over the premises on 20.09.1997 and to make payment of the due rent. The plaintiff alleged that the defendant neither handed over possession of the suit premises nor made any payment nor even replied. The plaintiff, therefore, claimed the relief of recovery of possession and mesne profits of Rs.1,800/- and further mesne profits at Rs.50/- per month.

The defendant in his written statement denied existence of any relationship of landlord and tenant between the parties. The defendant denied the claim of ownership of the plaintiff; and submitted that he had never alienated the house or any part thereof to the plaintiff but the documents relating to sale were got executed under misrepresentation and without consideration. The defendant denied execution of the rent

note and stated the same to be false and fabricated. The defendant also raised objection about competence of the suit and entitlement of the plaintiff to claim possession. The defendant alleged that he was not a tenant at all and had already acquired title to the property having purchased the same from its true owner. It was also asserted that the alleged tenancy was not terminated in accordance with law.

On the pleadings of the parties, the learned trial court framed the following issues for determination of the questions involved in the case:-

"(1) आया प्रतिवादी विवादग्रस्त सम्पत्ति में बहैसियत किरायेदार वादी काबिज है ?

-- वादी

(2) आया प्रतिवादी ने दिनांक-19.12.91 के पश्चात् का विधिक रूप से देय किराया वादी को अदा नहीं किया ?

-- वादी

(3) आया वादी को विवादित परिसर की समाज के कार्यों हेतु आवश्यकता हैं ?

-- वादी

(4) आया वादी, प्रतिवादी से अन्तःकालीन लाभ की राशि रूपये-1800/- प्राप्त करने का अधिकारी हैं ?

-- वादी

(5) आया यह वाद विधिक प्रावधानों की पालना करते हुए, पेश नहीं हुआ हैं तथा इस आधार पर खारिज किये जाने योग्य हैं ?

-- प्रतिवादी

(6) आया अदालत हाजा को यह वाद सुनने का क्षैत्राधिकार प्राप्त नहीं हैं ?

-- प्रतिवादी

(7) अनुतोष: “

It appears that in the first round of trial, after the plaintiff had concluded their evidence and the matter was pending for cross-examination of the DW-1 Sukha Ram (the present appellant), he did not appear despite opportunities; and the trial court proceeded to close his evidence and thereafter proceeded to decree the suit on 21.03.2005. The defendant-appellant took a regular appeal that was allowed by the first appellate court on on 12.08.2005 and the matter was remanded to the trial court extending opportunity of evidence to the defendant.

The learned trial court thereafter restored the suit to its number and with reference to the directions of the appellate court permitted completion of cross-examination of the defendant Sukha Ram on 29.08.2005. The defendant attempted to produce two witnesses Ram Singh and Tulsi Das on 29.08.2005 but examination of such witnesses was objected against by the plaintiff on the ground that their names did not appear in the list of witnesses and the appellate court had permitted completion of the statement of the defendant and examination of other witnesses only if their names occur in the list of witnesses. The learned trial court accepted the contention of the plaintiff and with reference to

the directions contained in the remand order, refused to permit examination of any witness other than those named in the list of witnesses. For no other witness being available on 29.08.2005, the learned trial court closed the evidence of the defendant and placed the matter for final arguments. An application was also moved by the defendant-appellant for FSL examination of the rent note Ex.1 and the said application was rejected on 24.10.2005 with reference to the order of remand with the observations that the appellate court while remanding the matter has not permitted adopting any such course of obtaining FSL report.

Thereafter, when the matter was finally heard and was posted for judgment, the plaintiff moved an application on 25.01.2006 for consolidating with the present suit another Civil Suit No.17/2004 (Bhopal Singh Vs. Sukha Ram). The learned trial court considered it appropriate to hear the parties on the said application and deferred the judgment. The application was ultimately allowed on 08.03.2006 after finding that the two suits related to the same property and were filed by two different plaintiffs against the same defendant Sukha Ram for recovery of possession of the same property. It was also noticed that both the suits were at final hearing stage. The learned trial court, therefore, ordered consolidation of both the suits.

It appears that thereafter, on 22.05.2006, a so-called deed of compromise was filed in relation to the other suit, i.e. Civil Suit No.17/2004, wherein the present appellant Sukha Ram alleged to have handed over possession of the property in question to Bhopal Singh by way of compromise. However, the learned trial court refused to record such proposition for settlement with the observations that it affects the rights of a third party, i.e. Sirvi Choyal Samaj (the present plaintiff); and without hearing them, no decision could be taken against their interest. It was also observed that if at all possession was handed over during pendency of the suit, the same was hit by the principles of *lis pendence*.

After hearing the parties, the learned trial court proceeded to decree the suit filed by the present respondent-plaintiff – Sirvi Choyal Samaj – on 10.07.2006. The learned trial court decided issue No.1 in favour of the plaintiff after disbelieving the statements of DW-1 Sukha Ram (the present appellant) for his taking shifting stands. The learned trial court also decided issue No.2 against the defendant because admittedly he had not made any payment of rent. Issue No.3 was also decided in favour of the plaintiff that they required the premises for their community purposes. It is an admitted position between the parties, however, that the provisions of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950

did not apply and those of Rajasthan Rent Control Act, 2001 are not applicable in relation to the premises in question. Thus, in fact, the question of existence of any such ground of eviction was not of much relevance in the present case.

In issue No.4, the learned trial court found the plaintiff entitled to recover an amount of Rs.1,800/- towards mesne profits. In issue No.5, the learned trial court observed that the defendant has failed to substantiate his objection that the plaintiff was not competent to maintain the suit. Issue No.6 was decided against the defendant with the observations that though he has raised the objection that the question of title to the property was involved in the suit and the property being of value more than Rs.1,00,000/-, the court was not having the jurisdiction to hear the same; but the suit was filed for eviction and recovery of mesne profits on the allegation that the defendant was a tenant and, therefore, the question of title was not germane to the litigation. In this manner, the learned trial court proceeded to pass a decree for possession and mesne profits.

It may be noticed that the other consolidated suit (Bhopal Singh Vs. Sukha Ram) was also taken up by the learned trial court for consideration and the same was also decided by the common judgment dated 10.07.2006. The learned trial court observed that the said suit was filed only in order

to frustrate the present suit filed by the respondent – Sirvi Choyal Samaj; and after noticing the proposition stated in the said suit of the defendant Sukh Ram handing over possession by way of compromise; and after finding that neither ownership of Bhopal Singh to the suit property was established nor relationship of landlord and tenant between Bhopal Singh and the defendant Sukha Ram was established, the learned trial court proceeded to dismiss the said suit.

Two appeals taken against the judgment and decree dated 10.07.2006 passed by the learned trial court in relation to the two suits aforesaid have been heard and decided by the learned District Judge, Pali by the impugned judgment and decree dated 24.04.2007.

After noticing a few facts in relation to the present suit and the issues framed by the trial court, the learned appellate Judge has noticed the contention on behalf of the present appellant that the learned trial court had been in error in consolidating the two suits; that the defendant had been deprived of adequate opportunity of leading evidence though the appellate court had extended such opportunity while remanding the matter; that the notice under Section 106 of the Transfer of Property Act was not in accordance with law; and that the trial court has erred in not holding the so-called sale-deed as fabricated while ignoring the cross-examination

of PW-1 Prema Ram.

The learned appellate Judge has proceeded to refer to the directions contained in the remand order dated 12.08.2005 and observed that only the witnesses named in the list were to be examined by keeping them present on the given date; and the witnesses produced by the appellant being not the listed witnesses and the appellate court having already defined the scope of further proceedings after remand, the trial court could not have gone beyond the same; and, thus, the opportunity extended by the trial court was sufficient. The learned appellate Judge has also observed that the registered documents were on record and there was no evidence available in rebuttal of the same; that the appellant has not adopted any proceedings for cancellation of the sale-deed; and that, in the present suit the only question requiring consideration was as to whether the appellant was the tenant and the respondent was the landlord. The learned appellate Judge also observed that where the facts were available on record about letting out of the premises after sale, the appellant could not question as to who was the real owner but only the person related with the property was free to adopt proceedings in that relation. The learned appellate Judge further observed that to this suit the provisions of the Transfer of Property Act applied whereas the Rent Control Act was not

applicable and the notice under Section 106 of the Transfer of Property Act (Ex.1) was exhibited and was proved; that the notice under Section 106 of the Transfer of Property Act was necessary only where there was no other contract; and that the plaintiff has established the contract whereby the premises were let out for 11 months on 20.06.1991; and when such rent note is available on record, the provisions of Section 106 of the Transfer of Property Act do not apply. With such observations and on such considerations, the learned Judge has proceeded to dismiss the appeal filed by the defendant-appellant.

Though various other questions have been urged on behalf of the appellant in this second appeal but from the submissions made on behalf of the parties and from the impugned judgment and decree passed by the first appellate court, the following question does arise for consideration:-

> "Whether the learned first appellate court has erred in not taking into comprehension all the facts and circumstances of the case and in not recording specific findings on the questions involved and in not deciding the appeal after framing proper points for determination ?"

It is noticed that in the present suit, the defendant-appellant has alleged that the sale-deeds were got executed from him under misrepresentation and that he was in

possession of the property as original owner. On the other hand, it appears that while defending an earlier suit filed by Bhopal Singh and others, being Suit No.59/1989, the defendant-appellant had taken the stand that he sold the property to the present plaintiff – Sirvi Choyal Samaj – (vide Ex.10). It is also noticed that on 22.05.2006, a proposition, prima facie indicative of an attempt to over-reach the process of law and to create complications in the matter, was put forward by producing a so-called compromise proposal in the suit filed by Bhopal Singh and others (Suit No.17/2004 that was consolidated with the present suit) whereby the defendant-appellant suggested that he has handed over possession of the suit premises to the said plaintiffs Bhopal Singh & others. The learned trial court has, of course, rightly refused to attest such compromise proposal for being directly affecting the rights of the third party, i.e., the present plaintiff – Sirvi Choyal Samaj; and while deciding the two suits together, has dismissed the other one with the finding that the same was filed only in order to frustrate the present suit. Though the judgment and decree in relation to the said suit have been challenged by way of a separate appeal and this Court would not like to make any comment in relation to the said suit any further but, comprehension of all the facts and circumstances gives rise to questions too many on the conduct of the

defendant-appellant who has apparently taken different and shifting stands.

Despite expressing reservations on the conduct of the defendant and his vacillating stand, this Court is constrained to observe that the learned first appellate court has chosen to dispose of the appeal filed by the defendant-appellant in a rather cursory manner and without even examining the material available on record and without recording specific findings before affirming those of the learned trial court. The learned appellate court has noticed a contention on behalf of the appellant that the learned trial court has ignored the effect of the statement made by PW-1 Prema Ram in his cross-examination; however, such contention has not been specially dealt with. The learned appellate court has made a comment that the question in the present case was as to whether the appellant was a tenant and the respondent was a landlord but, even on this core question, has not recorded any specific finding with reference to the evidence on record. Even the objection concerning the validity of notice under Section 106 of the Transfer of Property Act has not been specifically answered.

It is to be imbibed that by the very nature of its jurisdiction for being the final court on facts and law in any given case; and scope of second appeal being of

consideration of the case only if it involves substantial question of law, the first appellate court ought to deal with the pleadings and evidence and ought to record specific findings particularly on the points arising for determination before it. Ordinarily, the appellate court is not only to render its decision but, is required to state the reasons for the decision with reference to the points for determination (vide Order 41 Rule 31 CPC). Even when the first appellate court comes to the conclusion that the decree appealed from is to be affirmed, the necessity of appreciation of record particularly in relation to the points for determination cannot be obviated.

It shall be apposite to refer to the following observations of the Hon'ble Supreme Court in the case of Shantilal Kesharmal Gandhi Vs. Prabhakar Balkrishna Mahanubhav : (2007) 2 SCC 619:-

> "The appellate court should have made a proper reappraisal of the pleadings and the evidence in the case before coming to an independent conclusion of either affirming the findings of the trial court or of interfering with them. Some items of evidence brought to our notice are not seen discussed by the first appellate court. The first appellate court being the final court of fact and law, should have made a proper examination of the relevant materials."
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> (emphasis supplied)

In the present case, without expressing any opinion on the merits of the contentions urged by the appellant

and without expressing any opinion on the other aspects of the matter including different stands taken by the defendant-appellant, this Court is of opinion that categoric findings with reference to the evidence on record are definitely requisite from the first appellate court about existence of relationship of landlord and tenant between the parties; and about entitlement of the plaintiff to recover possession of the suit premises from the defendant-appellant before the decree for eviction is affirmed. The other contentions sought to be urged on behalf of the appellant including denial of opportunity of leading evidence do also require proper appreciation by the first appellate court. In these circumstances, though prima facie this Court is not satisfied with the different stands taken by the defendant-appellant but nevertheless having found that all the aspects of the matter have not been considered by the learned first appellate court, it appears appropriate that while setting aside impugned judgment and decree passed by the first appellate court, the matter be remanded for proper examination of the entire record and for disposal of the appeal filed by the defendant-appellant on merits.

In the aforesaid view of the matter, the instant second appeal is allowed to the extent indicated above; the impugned judgment and decree dated 24.04.2007 in Civil Appeal (Decree) No.40/2006 are set aside and the matter stands

remanded to the first appellate court for decision afresh in accordance with law. The parties shall appear before the first appellate court on **21.08.2007**. The record be sent back immediately.

Having regard to the circumstances of the case, it appears appropriate that the appellate court should hear and decide the appeal as early as possible preferably within a month of the appearance of the parties. It is also made clear that this Court has not pronounced on the merits of the case either way and any observation made herein shall have no adverse effect on the rights of either of the parties for their submissions before the first appellate court.

Costs of this appeal shall follow the result of the first appeal. The parties shall stand noticed through their counsel of the date of appearance, i.e. 21.08.2007, before the learned first appellate court.

(DINESH MAHESHWARI), J.

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